

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

In the Matter of:)
)
STERICYCLE, INC.)
)
 Employer,)
)
 and,)
)
INTERNATIONAL BROTHERHOOD)
OF TEAMSTERS, LOCAL UNION 391,)
)
 Petitioner.)

Case No: 04-RC-260851

**STERICYCLE, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS**

McMAHON BERGER, P.C.

James N. Foster, Jr.
Geoffrey M. Gilbert
2730 North Ballas Rd, Suite 200
St. Louis, Missouri 63131-3039
Telephone: (314) 567-7350
Facsimile: (314) 567-5968

Attorneys for Employer

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Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.69, STERICYCLE, INC., ("Stericycle" or "Employer"), by and through its attorneys, respectfully submits its Brief in Support of Its Exceptions to the Administrative Law Judge's Report and Recommendations on Objections ("Report"), dated November 10, 2020.

I. STATEMENT OF THE CASE

On May 27, 2020, the International Association of Sheet Metal, Air, Rail and Transportation Workers Local 44 ("Union") filed a Petition in Case No.04-RC-260851 seeking to represent all full-time and regular part-time Route Managers employed by the Employer at its Hanover Township, Pennsylvania facility. (TR 18).¹ The Union also filed a Petition and Amended Petition to represent the Employer's drivers, techs and warehouse workers in Case No. 04-RC-260408. The Union's petitions were processed by Region 4 of the National Labor Relations Board ("Board") according to the procedures set forth in the Board's election rule effective April 14, 2015 entitled "Representation – Case Procedures; Final Rule, 29 C.F.R. Parts 101, 102, 103.

On June 3, 2020, the Employer timely filed its Statement of Position in this case and in Case 04-RC-260408. In its Statement of Position, the Employer asserted that the Board should adhere to its longstanding policy of favoring mail ballot elections in both cases. (TR 18). On June 8, 2020, the Acting Regional Director issued an Order Consolidating Cases and Notice of Representation Hearing ("Order") wherein the Board consolidated 04-RC-260408 and 04-RC-260851.

¹ As used herein, references to "TR ___" are to the transcript of the October 29, 2020 hearing in this matter, with appropriate pagination; references to "ER Ex. ___" are to the Employer's exhibits introduced at the October 29, 2020 hearing with appropriate exhibit numbers; and references to "Board Ex. ___" are to the Board's exhibits introduced at the October 29, 2020 hearing, with appropriate exhibit numbers.

At the hearing on the consolidated cases, the Hearing Officer permitted the parties to file Post Hearing Briefs addressing, among other things, whether a manual or mail-ballot election should be held. The Company timely filed its Post Hearing Brief on Thursday, June 18, 2020, arguing that a manual ballot election was appropriate in the consolidated cases. (TR 18). On July 14, 2020, the Employer submitted a Supplemental Post Hearing Brief on the issue of the appropriateness of a manual ballot election, providing evidence that the proposed manual election would comply with the requirements for conducting manual elections safety set forth in the Office of General Counsel’s Memorandum GC 20-10 [hereinafter “GC Memo 20-10”]. (TR 19; ER Ex 1). In its Supplemental Post-Hearing Brief, the Employer outlined how it would comply with the requirements set forth in GC Memo 20-10, including protection of the safety of board agents and participants during the election, the size of the bargaining unit, location of the election, staff necessary to operate the election, status of the COVID-19 pandemic in the location of the election, and the Employer’s safety protocols, certifications and proposed election arrangements. (ER Ex. 1).

On July 16, 2020, the Acting Regional Director issued a Decision and Direction of Elections for petitions 04-RC-260408 and 04-RC-260851.² (TR 24; ER Ex. 17). The Decision and Direction of Elections stated:

The mail ballots for both elections will be counted on September 9, 2020 at 10:00 a.m. at a location to be determined, either in person or otherwise, **after consultation with the parties**, provided the count can be safely conducted on that date.

² The Employer preserves and does not waive its right to request a review of the Acting Regional Director’s Decision and Direction of Election as permitted by § 102.67, including § 102.67(h)(i), which states, in pertinent part, “A party may combine a request for review of the Regional Director’s decision and direction of election with a request for review of a Regional Director’s post-election decision, if the party has not previously filed a request for review of the pre-election decision,” which the Employer has not.

(TR 26; ER Ex. 17) (emphasis added). The Decision and Direction of Elections did not reference that the count of ballots would be conducted via Zoom application. (TR 26).

The Acting Regional Director issued a Notice of Election for mail ballot voting in Case 04-RC-260851, providing that mail ballots would be mailed to eligible employee at 5:00 p.m. on July 29, 2020 and that ballots would be commingled and counted on September 9, 2020 at 10:00 a.m. (ER Ex. 2). Ballots were required to reach the regional office by September 2, 2020 to be counted. (ER Ex. 2). The Notice of Election did not contain any reference to the fact that ballots would be tallied via Zoom. (TR 27-28). The Region counted the ballots on September 9, 2020, via Zoom technology.

On September 16, 2020, Stericycle filed timely objections to conduct affecting the election.

The Objections asserted as follows:

Objection 1 – The Employer objects because the irregularities here, individually and/or collectively, raise a reasonable doubt as to the fairness and validity of the election.

Objection 2 – The Employer objects because the Region failed and/or refused to comply with its stated election procedure and consult with the Employer about the manner and location to count the ballots, which was an irregularity.

Objection 3 – The Employer objects because the Employer was unable to monitor the handling of the ballots without interruption once they were removed from the yellow envelopes, which was an irregularity.

Objection 4 – The Employer objects because there is no way for the Employer to verify or confirm the Board agent took steps to secure and protect the ballots for the several minutes the Employer was unable to participate in the Zoom call.

Objection 5 – The Employer objects because it cannot be said with certainty that the ballots were not tampered with, mishandled, and/or damaged.

Objection 6 – The Employer objects because there is an appearance of irregularity in the handling and the counting of the ballots.

Objection 7 – The Employer objects because there is an appearance of irregularity in the process relating to the handling of the ballots, which jeopardize the public's confidence in the NLRB election process.

(Employer's Objections to Election).

On October 29, 2020, the Board held a hearing on the Employer's objections before Administrative Law Judge Andrew S. Gollin. At the hearing, Stericycle presented one witness, Dean Kpere-Daibo, one of the attorneys representing Stericycle at the ballot count on September 9, 2020. (TR 17). Mr. Kpere-Daibo was the only witness who testified; neither the Union nor the Region presented any witnesses. Consequently, his testimony was undisputed.

On November 10, 2020, the ALJ issued his Report and Recommendations on Objections. The ALJ recommended that the Regional Director of Region 18 overrule each of the Employer's objections and certify the Union as the exclusive bargaining representative for Stericycle's route managers. (Report, p. 9).

II. STATEMENT OF FACTS

Stericycle's facility in Hanover Township, Pennsylvania collects and treats medical and other waste from hospitals and other customers. The Union filed its petition in this case on May 27, 2020, seeking to represent Stericycle's full and part time route managers. (Report, p. 20).

The Acting Regional Director issued a Decision and Direction of Election on July 16, 2020. In the Decision and Direction of Election the Acting Regional Director ordered that ballots be counted on September 9, 2020 "at a location to be determined, either in person or otherwise, **after consultation with the parties,**" (TR 26; ER Ex. 17)(emphasis added). The Board Agent then unilaterally informed the parties via e-mail on September 4, 2020 that the ballot count would take place by Zoom videoconference, without identifying the location of the count. (ER Ex. 14). No prior consultation or discussion had occurred prior to the Board Agent's e-mail, despite the direction of the Acting Regional Director in the Decision and Direction of Election. In fact,

Stericycle's counsel was notified that the ballot count would be conducted by Zoom without **any** discussion or input from either of the parties. (TR 31; ER 14).

Before the Board Agent's unilateral decision to conduct the ballot count via Zoom, the Employer did not have an opportunity to make any arguments regarding an in-person count, or whether the Zoom application would be a safe, reliable or appropriate method for the count. (TR 28-29, 32). Moreover, contrary to the Decision and Direction of Election, the Board Agent did **not** consult with the Employer about whether that ballot count would be in person or otherwise, where the count would take place, whether the count should be by videoconference or whether Zoom was the appropriate videoconference technology for the ballot count. (TR 28-29, 32).

On September 9, 2020, a ballot count was conducted in Cases 04-RC-260851 and 04-RC-260408 via Zoom videoconference. (TR 45, 53). The Employer was not advised where the actual ballot count took place because it was done via Zoom by Board Agent Donna Bernini. (TR 33). Ms. Bernini conducted the ballot count for the earlier-filed petition in Case 04-RC-260408 first. (TR 45-47). For both ballot counts, the Board agent first showed the parties the outer yellow return envelope, and the signature on the back of each envelope. (TR 51). She then opened each yellow envelope, removed the inner blue mail-ballot envelope, and removed the ballot from inside the blue envelope, then set the ballots down. (TR 51, 72-73). The Employer's counsel could not see where the ballots were stacked because he was unable to see any table or desk due to the angle of Ms. Bernini's Zoom camera. (TR 51). He could not see where Ms. Bernini placed the yellow envelopes, blue envelopes or the ballots, or whether she shuffled the blue envelopes. (TR 73). Ms. Bernini then tallied the votes. (TR 37).

During the September 9, 2020 ballot count, the Employer's representatives, James N. Foster, Geoffrey M. Gilbert and Mr. Kpere-Daibo, were not able to observe the entire process of

the ballot count because of a failure of the Zoom technology. (TR 33). Mr. Kpere-Daibo testified that when Ms. Bernini was in the process of showing the parties the yellow outer envelopes with signatures, on the second or third envelope, the videoconference failed and his screen went “blank.” (TR 33). Mr. Kpere-Daibo testified that he went to the second floor of Employer’s counsel’s office to check if the problem was on the Employer’s counsel’s side, and if the internet or Zoom was offline. (TR 33-35). He then checked with James Foster, another of Employer’s attorneys, and was informed that Mr. Foster’s Zoom feed of the count had also failed. (TR 33-35). At approximately 10:33 a.m., the Board Agent sent an e-mail to Mr. Foster notifying him that the Board was having “technical issues.” (TR 36).

After talking to Mr. Foster, Mr. Kpere-Daibo returned downstairs where he and another of Stericycle’s attorneys, Geoffrey Gilbert, had been participating in the ballot count videoconference. (TR 33-35). After returning to the Mr. Kpere-Daibo checked the Zoom link again and after approximately a minute, the Acting Regional Director spoke to the Employer’s attorneys, although he did not appear on their video feed. (TR 33-35). The Acting Regional Director told Stericycle’s attorneys that “there was an issue with Zoom,” and that another conference call had been scheduled for the same time and had interfered with the parties’ videoconference. (TR 33-35). Mr. Kpere-Daibo also testified that “at some point” the Union returned to the videoconference. (TR 33-35). The last person to rejoin the conference was Ms. Bernini, who then restarted the process of showing the parties the yellow envelopes and proceeding with the ballot count. (TR 33-35, 56-57). Mr. Kpere-Daibo testified that the conference had been offline for three to five minutes. (TR 41, 60). His testimony regarding the failure of the Zoom teleconference was uncontradicted; no other witnesses testified at the hearing.

Mr. Kpere-Daibo also testified without contradiction that he could not see where the Board Agent put the ballots or whether she shuffled them because he was unable to see a table or desk due to the angle of Ms. Bernini's camera. (TR 65). After Ms. Bernini completed the process of opening the blue envelopes and removing the ballots, she tallied them. (TR 67).

There were seven (7) eligible voters in the unit in Case 04-RC-260851. (TR 41). Five votes were cast and one was challenged. (TR 41). The Board Agent then prepared the tally of votes. (TR 37, 41; ER Ex. 16). According to the tally, five votes were cast in favor of the Union and one was challenged. (ER Ex. 16).

In Case 04-RC-260408, which was counted immediately before the count in this case at the same videoconference, four votes were cast for the union, three were cast against the union and one was voided. (ER Ex. 18). That election, however, was set aside by the Regional Director of Region 18 on the grounds that the Region failed to permit the voter whose ballot was voided to cure the ballot's error regarding the voter's signature, even though the Region had sufficient time to send the voter a new ballot. (ER Ex. 18).

Mr. Kpere-Daibo testified without contradiction that he had had similar technological issues with Zoom conferences before the September 9, 2020 vote count, including at a Zoom conference in state court on a motion for summary judgment. (TR 39). In that Zoom hearing, the conference was cut off after thirty minutes and the court agreed to provide the parties two additional hearings on the motion. (TR 40).

In addition to Mr. Kpere-Daibo's testimony, the Employer also attempted to introduce evidence at the hearing of media articles regarding the technological failures of Zoom technology, but the ALJ sustained the Union's objection to those documents. (TR 30; ER Exs. 3-13). For example, Exhibit 3 shows that the Zoom application "is being banned by governments across the

world” because of various factors, including the high probability of information leaks, investigations by states attorneys general into the privacy and security practices of Zoom, vulnerabilities to hackers, access to sensitive information, the leaking of Zoom users passwords, and the intrusion of uninvited attendees at Zoom conferences. (ER Ex. 3). Companies such as Google, SpaceX, and Smart Communications, government agencies such as NASA, the United States Senate, the New York Department of Education and governments such as Taiwan, Germany and Australia have all banned the use of the Zoom application because of security concerns. (ER Exs. 4, 5, 6, 7, 8, 9, 10, 11, 12). The union’s attorney, the attorney for the Region, and the Hearing Officer acknowledged that Zoom technology had the potential for technical issues. (TR 29-30).

III. STATEMENT OF ISSUES

1. Whether the Regional Director should grant Employer Exception 1, reject the ALJ’s recommendation that Employer Objection 1 be overruled, and overturn the election because the irregularities of the vote count on September 9, 2020, both individually and collectively, including the failure of the Zoom technology, raised a reasonable doubt about the fairness and validity of the election.

2. Whether the Regional Director should grant Employer Exception 2, reject the ALJ’s recommendation that Employer Objection 2 be overruled, and overturn the election because the Region failed to comply with its own election procedure.

3. Whether the Regional Director should grant Employer Exception 3, reject the ALJ’s recommendation that Employer Objections 3-7 be overruled, and overturn the election because the failure of the September 9, 2020 Zoom teleconference raised a question about the fairness and validity of the election.

IV. ARGUMENT

A. The Regional Director Should Grant Employer’s Exception 1, Reject The ALJ’s Recommendation That Employer Objection 1 Be Overruled And Set Aside The Election Because The Irregularities Of The Vote Count Raised A Reasonable Doubt About The Fairness And Validity Of The Election.

The ALJ determined that Stericycle’s first objection should be overruled because it lacked specificity. (Report, p. 5). Contrary to the ALJ’s conclusion, however, Stericycle’s Objection 1 was not a “catch all” objection; nor was it “vague.” (Report, p. 5). Stericycle’s Objection 1 was that the irregularities of the election, individually and/or collectively, raised a reasonable doubt as to the fairness and validity of the election. These irregularities included not just the failure of the Zoom conference during the ballot count process, but the Region’s failure to consider a manual election and failure to conform to its own election procedure.

The Board has held that, in a representative election, conduct “which tends to destroy confidence in the Board’s election process, or which could reasonably be interpreted as impugning the election standards [the Board seeks] to maintain,” is sufficient grounds to set aside an election. *Athbro Precision Eng’g Corp.*, 166 NLRB 966 (1967), *vacated sub nom. I.U.E. v. NLRB*, 67 LRRM (BNA) 2361 (D.D.C. 1968), *acquiesced in*, 171 NLRB 21 (1968), *enforced sub nom. NLRB v. Athbro Precision Eng’g Corp.*, 423 F.2d 573 (1st Cir. 1970); *see also Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1989). The Board’s election process must be “above reproach,” *The Royal Lumber Co.*, 118 NLRB 1015, 1017 (1957), and “its role in the conduct of elections must not be open to question.” *York Telephone Co.*, 109 NLRB 788, 790 (1954).

In this case, the multiple irregularities – which were undisputed at the hearing in this matter – both individually and collectively could reasonably be interpreted as “impugning the election standards” the Board seeks to maintain. The Regional Director first ordered a manual election due to the coronavirus pandemic, disregarding the Board’s long-standing policy favoring manual

elections.³ See National Labor Relations Board, Casehandling Manual, § 11301.1 (“[t]he Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually”); *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998) (Board elections should generally be conducted manually); *Nat’l Hot Rod Assoc.*, 368 NLRB No. 26 n. 5 (2019) (difficulties encountered by employees in receiving mail ballots “illustrate one reason why manual elections are, and should be, preferred”); *Rocky Mountain Planned Parenthood, Inc.* 2017 WL 5665355 (2017) (manual elections preferred). After making that determination, the Regional Director then provided that the ballots would be counted on September 9, 2020 “at a location to be determined, either in person or otherwise, *after consultation with the parties*,” (TR 26; ER Ex. 17). Despite this instruction, the Region unilaterally decided to conduct the ballot count via Zoom videoconference (ER Ex. 14). Stericycle was not consulted before the decision or provided with any method to object to the decision. (TR 31; ER 14).

Further, it is undisputed that the Zoom teleconference which the Region insisted on failed during the ballot counting process and the parties were unable to view the outer yellow envelopes, inner blue envelopes or ballots for a period of three to five minutes. (TR 33-36). The Employer’s counsel was also unable to see where the Board Agent placed the outer yellow envelopes, the blue inner envelopes or the ballots during the counting process. (TR 65). This combination of irregularities – the failure to consider an in-person election, the failure to consult with the Employer prior to the unilateral decision to hold the ballot count via Zoom videoconference, and the failure of the Zoom conference – led to irregularities which “impugned the election standards”

³ On November 9, 2020 the Board issued its Decision on Review in *Aspirus Keweenaw*, 370 NLRB No. 45 (slip opinion) (Nov. 9, 2020), in which it Board set forth “the guidelines and parameters applicable to determining the propriety of a mail-ballot election” in light of the Covid-19 pandemic. *Id.* In addition to overturning the election on the grounds set forth herein, the Regional Director’s decision to hold this election manually should be reconsidered and reversed in light of the *Aspirus Keweenaw* guidelines.

the Board purportedly seeks to maintain. Stericycle's objection to these irregularities was neither vague nor generalized, as the ALJ concluded. His recommendation should, therefore, be rejected, Stericycle's first objection should be sustained and the election should be overturned on this basis.

B. The Regional Director Should Grant Employer's Exception 2, Reject The ALJ's Recommendation That Employer Objection 2 Be Overruled And Set Aside The Election Because The Region Failed To Comply With Its Own Election Procedure.

The ALJ determined that Employer's Exception 2 should be overruled because "[t]he mechanics of an election are within the discretion of the Regional Director." (Report, p. 5). Employer's Objection 2 was that "the Region failed and/or refused to comply with its stated election procedure and consult with the Employer about the manner and location to count the ballots, which was an irregularity."

While a Regional Director has discretion to determine "the mechanics of an election," that discretion is not without limitations. The Board may overturn a Regional Director's decision concerning the mechanics of an election when the Regional Director has abused his discretion. *National Van Lines*, 120 NLRB 1343, 1346 (1958). And while the Regional Director may have the discretion to determine the method of conducting an election, when that decision is made – as it was here – the process chosen should be adhered to by the Board Agent conducting the election. In this case, it was not. Here, the Acting Regional Director determined that a mail ballot election should take place, and that ballots would be counted on September 9, 2020 "at a location to be determined, either in person or otherwise, *after consultation with the parties*," (TR 26; ER Ex. 17)(emphasis added). After the Decision and Direction of Election was issued, the Board Agent was not free to simply ignore the process chosen by the Acting Regional Director regarding the location and method of the ballot count and the specific instruction that the parties were to be consulted.

There is no dispute that the Region did not follow its own directive in determining the location and method of the ballot count. Despite the instruction contained in the Decision and Direction of Election, the Board Agent unilaterally determined that the ballot count would be conducted via Zoom videoconference without consultation of the parties. (ER Ex. 14). Stericycle was not consulted before the unilateral decision was made to conduct the ballot count via a Zoom teleconference. (TR 31, ER 14). Nor was Stericycle provided with any way to object to the method of the ballot count. (TR 31; ER 14).

The ALJ's determination that the Acting Regional Director had discretion to determine the method of election fails to recognize that, having exercised that discretion and determined that a mail ballot election would be held, neither the Acting Regional Director nor the Board Agent was then free to ignore the specific election procedure the Acting Regional Director had chosen. The Acting Regional Director specifically required that the parties have input into the location and method of the ballot count. It is undisputed that the process set up by the Acting Regional Director was **not** followed. Nothing in the Casehandling Manual or under the Board's Rules and Regulations permits the Region to arbitrarily and unilaterally change its election procedure after it has been ordered. The failure to follow the election procedure set up by the Acting Regional Director was, therefore, an abuse of discretion, and the election should be overturned on this basis.

C. The Regional Director Should Grant Employer's Exception 3, Reject The Alj's Recommendation That Employer Objections 3-7 Be Overruled, And Set Aside The Election Because The Failure Of Zoom Technology At The Vote Count Raised A Question About The Fairness And Validity Of The Election.

The ALJ determined that Employer's objections 3-7 should be overruled on the grounds that "the appearance of irregularity does not require setting aside an election." (Report, p. 6). Stericycle's Objections 3 through 7 related to the failure of the Zoom videoconference during the ballot count on September 9, 2020, including the following objections:

- That the Employer was unable to monitor the handling of ballots without interruption;
- That the Employer could not verify or confirm that the Board Agent took steps to protect and secure the ballots for the multiple minutes the Employer was cut off from the Zoom videoconference;
- That it could not be said with certainty that the ballots were not tampered with, mishandled, and/or damaged;
- That the failure of the Zoom videoconference resulted in an appearance of irregularity in the handling and counting of ballots; and
- That the failure of the Zoom videoconference resulted in an appearance of irregularity which jeopardized the public's confidence in the election process.

(Employer's Objections to Election).

The ALJ's determinations that "the appearance of irregularities does not require setting aside an election" is incorrect. (Report, p. 6). The Board has held that it must decide whether the facts raise "a reasonable doubt as to the fairness and validity of the election" when the integrity of the election process is challenged. *Dunham's Athleisure Corp.*, 315 NLRB 689 (1994), quoting *Allied Acoustics*, 300 NLRB 1181 (1990). The Board must "maintain and protect the integrity and neutrality of its procedures" when conducting an election. *Athbro Precision Eng'g Corp.*, 166 NLRB 966 (1967), *vacated sub nom. I.U.E. v. NLRB*, 67 LRRM (BNA) 2361 (D.D.C. 1968), *acquiesced in*, 171 NLRB 21 (1968), *enforced sub nom. NLRB v. Athbro Precision Eng'g Corp.*, 423 F.2d 573 (1st Cir. 1970)). As noted above, the regularity of Board elections must be "above reproach," *The Royal Lumber Co.*, 118 NLRB 1015, 1017 (1957), and "not open to question." *New York Telephone Co.*, 109 NLRB 788, 790 (1954). If there is a reasonable doubt about "the manner

in which the election was conducted,” the election should be set aside. *Polymers, Inc.*, 174 NLRB 282 (1969), *enfd*, 414 F.2d 999 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970). Any conduct “which tends to destroy confidence in the Board’s election process, or **which could reasonably be interpreted as impugning the election standards** [the Board seeks] to maintain,” is sufficient grounds to set aside an election. *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1989), (quoting *Athbro*, 166 NLRB at 966) (emphasis added). Thus, contrary to the ALJ’s conclusion, conduct during an election that could be reasonable interpreted to impugn election standards, including “the appearance of irregularities” is sufficient to set aside an election.

The ALJ was also incorrect in determining that “the Employer presented no evidence that the Board agent failed to follow established procedures or acted improperly in handling or counting the ballots,” and that Stericycle relied on “uncertainty and implied speculation about what *could have* happened.” (Report, p. 8) (emphasis in original). As noted above, the undisputed evidence showed that the Board Agent did **not** follow the instructions set forth in the Decision and Direction of Election when she failed to consult with the parties regarding the location and method of counting ballots. Instead, she unilaterally chose to use a Zoom teleconference to conduct the ballot count and the failure of that technology was the direct result of the use of Zoom technology, and the Region’s scheduling of another Zoom conference while the ballot count was in process. It was not the fault of the Employer that the Zoom conference was abruptly cut off; the Acting Regional Director admitted that the failure occurred because another conference was scheduled by the Region at the same time. (TR 33-35). Further, it was undisputed that the Board Agent set the yellow envelopes, blue envelopes and ballots in a place that was off-camera such that the Employer’s counsel could not see them and could not determine if they were shuffled. (TR 65).

Evidence of those actions was undisputed and they were clearly **not** consistent with “established election procedures,” contrary to the ALJ’s determination.

Moreover, as the cases set forth above make clear, the Employer was not required to present evidence of actual misconduct on the part of the Board Agent (although it did so); it was required to present evidence that the integrity of the election was compromised. The Employer presented ample evidence that there was a reasonable doubt about the fairness and integrity of the election. The undisputed evidence presented at the hearing established that during the showing of the yellow outer envelopes, the Zoom videoconference was off line for three to five minutes. (TR 33-35). During the time the Zoom conference was down, the Employer could not observe the yellow envelopes containing the ballots and could not confirm that they were secured and protected. Counsel for the Employer was unable to determine if the process of showing the yellow envelopes was continuing, or to see **any** of the ballot counting process the three to five minute period the videoconference was off-line. Counsel was also unable to see where the Board Agent put the yellow and blue envelopes or that ballots due to the angle of the Board Agent’s camera. (TR 41, 51, 60, 65, 73).

The decision to hold the ballot count via Zoom videoconference denied the Employer of its “opportunity to monitor the conduct of the election, ballot count, and determinative ballot procedure.” *Paprikas Fono*, 273 NLRB 1326, 1328 (1984). The integrity of the election was thus called into doubt because of the Board Agent’s insistence on the use of Zoom technology. There is also no dispute that the Zoom technology failed during the process of showing the parties the outer yellow envelopes. There was nothing speculative about the Employer’s evidence; that evidence established that the fairness and integrity of the election were called into doubt.

In support of his conclusion, the ALJ relied on four cases where the Board refused to overturn elections because of irregularities with the protection of ballot boxes. (Report, pp. 6-7); *see N. Sumergrade & Sons*, 123 NLRB 1951, 1951-52 (1959); *Polymers, Inc.*, 174 NLRB 282 (1969); *Decible Products, Inc.*, 267 NLRB 1053 (1983); *Sawyer Lumber, LLC*, 326 NLRB 1331 (1998). He also cited several cases which he contended showed that the Board only sets aside elections “in which there are substantial irregularities in the handling of ballots.” (Report, pp. 7-8); *see Paprikas Fono*, 273 NLRB 1326, 1328 (1984); *Jakel, Inc.*, 293 NLRB 615 (1989); *Madera Enterprises*, 309 NLRB 774 (1992); *Concrete Express of NY, LLC*, 368 NLRB No. 135 (2019). None of these cases, however, involved elections where the parties are not able to observe in person but only by videoconference. None involved the failure of the parties to be able to view the counting of the ballots in their entirety.

In fact, the case whose facts bear the most resemblance to the facts of this case resulted in the overturning of an election. *Austill Waxed Paper Co.*, 169 NLRB 1109 (1958). In *Austill*, the ballot box was left unsealed and unattended for two to five minutes, and the employer objected to the conduct of the election on the grounds that the integrity of the election was called into question. *Id.* at 1109. The Board did **not** require the employer to present evidence of any misconduct related to the two to five minute period the ballot box was left unattended. *Id.* It reversed the Regional Director’s decision to overrule the employer’s objection regarding the failure to safeguard the election, stating that the objection “goes to the very heart of the conduct of an election – maintaining the integrity of the ballot box.” *Id.* The Board reasoned, “We do not believe that we should speculate on whether something did or did not occur while the ballot box was left wholly unattended.” It also stated, “The Board, through its entire history, has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting process;

and where a situation exists, which, from its very nature, casts a doubt or cloud over the integrity of the ballot box itself, the practice has been, without hesitation, to set aside the election.” *Id.* The Board concluded that “[i]t is the Board’s responsibility to certify to the validity of its own balloting procedures, and, if it cannot, as here, we believe that in the interest of maintaining our high standards, there is no alternative but to set the election aside and direct a second election.” *Id.* at 1109-10; *see also Concrete Express of NY, Inc.*, 368 NLRB No. 135 (2019), *New York Telephone*, 109 NLRB at 790; *The Royal Lumber Co.*, 118 NLRB at 1017.

This case, like *Austill*, involved a three to five minute gap in the securement of the ballots, resulting in a loss of integrity of the ballots. It was **not** speculation to object on the basis of maintaining the integrity of the ballots, just as it was not in *Austill*. As in *Austill*, the parties’ inability to view the ballots “goes to the very heart of the election.” Moreover, contrary to the ALJ’s holding, the Board does **not** require an objecting party to demonstrate that ballots were actually tampered with or the Board Agent engaged in misconduct; as the Board noted in *Austill*, it will not “speculate on whether something did or did not occur” while ballots are unattended because the Board must “establish and maintain the highest standards possible to avoid any taint of the balloting process.” *Id.* at 1109. The failure of the Zoom videoconference in this case was the equivalent to the ballot box being left unattended in *Austill* and resulted, by its nature, in the same “doubt or cloud” over the integrity of the ballots. According to *Austill*, the Employer was required only to show that there was a “taint in the balloting process,” which it did through its undisputed evidence regarding the three to five minute gap in the ballot count. Just as in *Austill*, therefore, in order to “maintain the highest standards possible to avoid any taint of the balloting process,” the election must be set aside. *Id.*

Moreover, the ALJ's determination that the Employer did not present evidence of misconduct and that its objections were based on speculation wholly ignores the fact that the Employer could not produce evidence of actual misconduct during the ballot count **because** of the failure of the Zoom technology during that process. The Employer's counsel could not observe part of the ballot counting process because of the Region's failure to secure the Zoom conference, which it had unilaterally chosen without consultation of the parties. The Employer's objections concerned the unfairness of the process because it could not determine whether misconduct occurred. The ALJ's emphasis on lack of evidence and speculation is nothing more than circular reasoning.

In this case, the ALJ erred in determining that Stericycle did not present sufficient evidence to support its objections to the election. In fact, the Employer's evidence that the ballot count was flawed was undisputed and demonstrated that there was a reasonable doubt as to the fairness and validity of the election. Pursuant to controlling Board authority, the election process was tainted by the blackout in the Zoom videoconference during the ballot counting. In order to maintain the integrity of the election, the ALJ's recommendations should be rejected, the Employer's Exceptions should be granted and the election should be set aside.

V. CONCLUSION

WHEREFORE, for these reasons, and for those reasons set forth in Employer's Objections to Election and Post Hearing Brief on Objections to Election, the Employer respectfully requests that the Regional Director consider the Exceptions, that it grant said Exceptions, and that it overturn the election previously held.

Respectfully submitted this 24th day of November, 2020.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ James N. Foster, Jr.

James N. Foster, Jr.

Geoffrey M. Gilbert

2730 North Ballas Rd, Suite 200

St. Louis, Missouri 63131-3039

Telephone: (314) 567-7350

Facsimile: (314) 567-5968

Attorneys for Employer

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2020, a true and correct copy of the above document was filed via electronically on the Board's website with the following individual:

Jennifer A. Hadsall
Regional Director
National Labor Relations Board
Region 18
Federal Office Building
212 Third Avenue, South
Suite 200
Minneapolis, MN 55401-2657

/s/ James N. Foster, Jr.

I further certify that on the 24th day of November, 2020, a true and correct copy of the above document was served via electronic mail upon the following individuals:

Richard P. Heller
Acting Regional Director
National Labor Relations Board
Region 04
100 E. Penn Square, Suite 403
Philadelphia, Pennsylvania 19107

Andrew S. Gollin
Hearing Officer
National Labor Relations Board
Region 04
100 E. Penn Square, Suite 403
Philadelphia, Pennsylvania 19107

Lance Geren
Andrew Kelsner
O'Donoghue & O'Donoghue, LLP
325 Chestnut Street, Suite 600
Philadelphia, PA 19106
lgeren@odonoghuelaw.com
akelsner@odonoghuelaw.com

/s/ James N. Foster, Jr.